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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC; MENU FOODS INC.; DEL MONTE CORPORATION; SUNSHINE MILLS, INC.; CHEMNUTRA INC.; and DOES 1 through 100, Inclusive, Defendants.	Case No. CV-S- 00682- PMP-LRL **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT DEL MONTE CORPORATION'S MOTION TO DISMISS COMPLAINT** DATE: TIME: DEPT: JUDGE:

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I. INTRODUCTION

Plaintiffs allege that Defendants have cheated United States consumers and Defendants' competitors alike by lying about the origin of their "Ol' Roy" brand pet food products as "Made in the U.S.A." The laws of the United States, Nevada and the other states uniformly do not allow businesses to cheat to compete for market share by lying about the origin of the sellers' product. Mislabeling as to product origin violates N.R.S. §598.0915 and the consumer protection statutes of every other state.[1]

Defendant Del Monte Corporation's motion first attacks the sufficiency of the claim for violation of Nevada's consumer fraud laws (N.R.S. §598.0915). That argument is entitled to short shrift because this action is based upon the Defendants' scheme to distribute products as "Made in the USA", when in fact this designation was false. Defendants have admitted that components of the products were made in China. This conduct is a per se violation of N.R.S § 598.0915.

Further, this conduct violates federal standards and the laws of the 49 other states. As a result, a nationwide class is appropriate. To the extent that this Court later determines, after a conflict of laws analysis, that Nevada law cannot be applied to the claims of certain members of the Class, the litigation would still be manageable because the conduct violates the laws of the states where Defendants are headquartered and the laws of all other states. In any event, this class manageability issue should not be decided now in a Rule 12 context.

Del Monte also challenges the remedies requested in the Complaint. Settled federal law provides that a Rule 12 motion to dismiss cannot be used to challenge the remedies requested in a Complaint, but must instead address an entire claim. Moreover, the alternative remedies requested by Plaintiff are appropriate for the claims pled.

Del Monte finally argues that the unjust enrichment claim is legally insufficient. First, Del Monte argues that the prayer for a legal remedy means that an equitable remedy is unavailable as a matter of law. There is no such rule under either federal or Nevada law. In fact, the law is to the contrary because these claims can be pled in the alternative under F.R.C.P. §8(e). Second, Del Monte argues that factually no benefit was retained. This argument is contrary to the allegations of the Complaint (¶46 and ¶47), and is therefore improper on a motion to dismiss. Moreover, Del Monte's argument relies exclusively on a recall notice expressly limited to specified contaminated lots, and did not provide for any remedy as to the Defendants' falsely labeled products that were not recalled. Defendants have clearly retained benefits from their unlawful conduct as to their mislabeled products that were not recalled.

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[1] Defendants are cheating consumers who think they are buying a product made in America and also cheating their competitors who sell pet food that actually is made in America. This deceptive and unfair conduct is like the conduct condemned by the California Supreme Court in *Stop Youth Addiction v. Lucky Stores Inc*., 17 Cal.4th 553, 579, 950 P.2d 1086, 1103 (1998) ("Merchants who violate the law by selling tobacco products to minors obtain a competitive advantage over their law-abiding counterparts who do not share in the profits from such illegal sales.")

For the reasons set forth hereinbelow, Plaintiff respectfully requests that this Court deny Defendant's motion to dismiss.

II. STATEMENT OF FACTS

The instant Class Action Complaint involves a scheme among the Defendants through which "Ol' Roy" brand pet food products were intentionally mislabeled and sold to consumers as "Made in USA," when in fact components of the "Ol' Roy" brand pet food products were made and/or manufactured in China. Specifically, the wheat was processed in China into wheat gluten, and as a result, Defendants were not entitled to label these products as "Made in the U.S.A." as Defendants well know. This action is brought on behalf of all consumers throughout the United States who purchased "Ol' Roy" brand pet food products which falsely represent on the product label to have been "Made in USA" during the applicable Class Period. (Complaint at ¶ 1).

Central to the Defendants' marketing of certain of their "Ol' Roy" products is the representation and designation that such products were and are "Made in USA." Defendants package these products with the designation on the label or packaging, in capital and bold lettering, that the products were "MADE IN USA." (Complaint at ¶ 2).

Studies show that the "MADE IN USA" is a substantial factor in consumer purchasing decisions. More importantly here, in the context of food products, the designation that the products were "Made in USA" becomes a central and primary consumer concern because of fears about contaminants and the differences in health and safety procedures in foreign countries. (Complaint at ¶ 2).

All of the pet food products under the brand name "Ol' Roy" sold to consumers in Nevada and nationwide were mislabeled in the same way. On each package of "Ol' Roy" pet food, the label uniformly represents that the product was "MADE IN USA" in capital letters. (Complaint at ¶ 4). Contrary to this representation, "Ol' Roy" brand pet foods were not "Made in USA" as falsely designated, but instead, were manufactured either in whole or in part, in China. On or after March 16, 2007, as a result of the investigation into these products, Defendants disclosed for the first time that the "Ol' Roy" brad pet food products contained ingredients manufactured in China. (Complaint at ¶ 6).

Consumers and users of these products are particularly vulnerable to these deceptive and fraudulent practices. Defendants were in the exclusive possession of information regarding the country of origin for "Ol' Roy" brand pet food products. The "Made in USA" labeling as to designation of origin is a material factor in many people's purchasing decisions, as they believe they are buying truly American products and supporting American companies and American jobs. Consumers generally believe that "Made in USA" products are higher quality products than those of other countries which is especially true with regard to food products. Unaware of the falsity of the Defendants' country-of-origin claims, Plaintiff and the other members of the Class all purchased "Ol' Roy" brand pet food products that had been fraudulently marketed and mislabeled by Defendants. State and federal laws uniformly outlaw this mislabeling to protect consumers and competitors alike from this type of false advertising and predatory conduct. Defendants' deception of consumers is ongoing and will victimize consumers every day until the practice is deterred by judicial intervention. (Complaint at ¶ 11).

The country-of-origin designation is especially important and material in the context of food products because of oversight one expects by the Food and Drug Administration and local health agencies over food products made in the United States. For example, food products made in foreign countries can be grown or made using banned pesticides and/or chemicals, which one would not expect to find in "Made in USA" labeled food products. Consumers who purchase food products labeled "Made in USA" reasonably believe that they are purchasing products which have been grown and made in accordance with state and federal regulations. These same regulations are not present in foreign countries where unsafe and deleterious chemicals may be used without regulatory oversight.

(Complaint at ¶ 12).

The Plaintiff Margaret Picus is a resident of Nevada, who purchased her "Ol' Roy" brand pet food products on multiple occasions at a Wal-Mart retail store located in Henderson, Nevada during the Class Period. The Plaintiff purchased "Ol' Roy" brand pet food products as a consumer for the household purpose of feeding the product to her pet during the Class Period. (Complaint at ¶ 13). When the Plaintiff learned of the Defendants' fraudulent conduct she filed the instant lawsuit on behalf of herself and all similarly situated consumers nationwide who purchased fraudulently labeled Ol' Roy pet food products at Wal-Marts prior to March 16, 2007. (Complaint at ¶ 21). The Complaint alleges three causes of action based upon the fraudulent designation of Ol' Roy products as "Made in the USA": (1) violations of Nevada's consumer fraud laws, particularly N.R.S. Sections 41.600 and 598.0915, (2) unjust enrichment, and (3) common law fraud and concealment.

III. LEGAL BACKGROUND FOR PLAINTIFF'S CLAIMS

Until the 1930s, the rule of *caveat emptor* prevailed in the marketplace. Deceived consumers had no claim at common law. Consumers were left to the devices of unscrupulous sellers under the doctrine of *caveat emptor*.

Then in 1938, Congress amended the Federal Trade Commission Act ("FTC Act"), and in particular, Section 5. "Of particular importance was a 1938 amendment to the act, which expanded the Federal Trade Commission's (FTC) preexisting jurisdiction over "unfair methods of competition'" to include "unfair or deceptive acts or practices." (52 Stat. 111 (1938), amending 15 U.S.C. § 5.)" *Bank of the West v. Superior Court*, 833 P.2d 545, 551; 2 Cal. 4th 1254, 1264 (1992). **"This amendment, which became a model for state regulatory statutes, gave the FTC concurrent jurisdiction over unfair business practices that harmed the public in order to bring confidence and honesty back to the marketplace."** *Id.*[2]

Despite the broad scope and reach of the FTC Act, Section 5 was not privately actionable. Therefore, in order to give consumers a private right of action, Congress and the FTC encouraged the

[2] Emphasis added and internal citations omitted unless otherwise indicated

states to enact their own similar statutes to protect consumers. Every state and the District of Columbia have enacted some law or combination of laws prohibiting acts of unfair competition. **The primary purpose of these statutes was to "extend to the entire consuming public the protection once afforded only to business competitors."** *Barquis v. Merchs. Collection Assn.*, 496 P.2d 817, 828; 7 Cal. 3d 94, 109 (1972). These state consumer protection laws and the FTC Act have **concurrent jurisdiction** over unfair and deceptive business practices. *Consumer Justice Center v. Olympian Labs*, 99 Cal. App. 4th 1056, 1058-61 (2002); *Colligan v. Activities Club of New York*, 442 F.2d 686, 693 (2nd Cir. 1971) ("adequate private remedies for consumer protection, which to date have been left almost exclusively to the states, are readily at hand."). **Therefore, the fact that a practice violates federal law does not mean that the same practice cannot be challenged under state law. Instead, state courts look to the "parallel" authority and decisions of the FTC to determine whether a practice is deceptive or unfair under the state laws.** *Cel-Tech Communications v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 543; 20 Cal. 4th 163, 185 (1999).

The concurrent jurisdiction of state and federal law over deceptive trade practices is further evidenced by Nev. Rev. Stat. Ann. § 598.0923 which defines "deceptive trade practices" as including conduct that "[v]iolates a state or federal statute or regulation relating to the sale or lease of goods or services." See *George v. Morton*, 2007 U.S. Dist. LEXIS 15980 at * 32 (D. Nev. March 1, 2007) (denying motion to dismiss claim under Nevada Unfair and Deceptive Trade Practices Act alleging violation of state and federal regulations in condominium sales).

There are four basic types of state consumer protection statutes. Some states, like California, Florida and Hawaii, enacted "Little FTC Acts" which were patterned after Section 5 of the FTC Act by generally prohibiting deceptive and unfair business practices. Other states, like Georgia, Tennessee and Pennsylvania, enacted statutes which prohibited specific listed practices and generally prohibited any act that is deceptive or unfair to the consumer. Ohio, Kansas and Utah patterned their consumer protection laws after the Uniform Consumer Sales Practices Act. Finally, Nevada, and twelve other states, including Delaware, Illinois and Oregon, enacted a version of the Uniform Deceptive Trade Practices Act which provides for consumer protection by prohibiting specific "deceptive trade practices." **Relevant to this case, one of these expressly prohibited practices is the use of**

"deceptive representations or designations of geographic origin." Importantly, mislabeling is actionable under all four types of consumer protection laws.

This background is important to the consideration of this case because the history of the enactments illustrates that federal standards are useful in determining whether the state statutes are violated and because our system relies on private state enforcement alongside federal agency enforcement. Thus, not only is the conduct in this case properly challenged under state law, state law enforcement is the only source of authority for consumers to seek redress.[3]

IV. ARGUMENT

Del Monte argues that the complaint should be dismissed because (i) the claim for violation of Nevada's consumer protection laws alleges violations of federal law with respect to the "Made in the USA" designation, (ii) the claim for unjust enrichment fails as a matter of law, (iii) Plaintiff cannot legally plead the laws of states other than Nevada, (iv) the prayer for restitutionary and injunctive relief must be stricken, and (v) the recall notice is a complete defense.

A. The Applicable Pleading Standard

In considering a motion to dismiss, the court accepts the plaintiff's allegations as true and construes them in the light most favorable to the plaintiff. *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003); *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1046 (9th Cir. 2006); *Adams v. Johnson,* 355 F.3d 1179, 1183 (9th Cir. 2004). The sufficiency of the complaint must be determined considering the allegations in their entirety and viewing all facts in the complaint as a whole. *Id.* There is a strong presumption against dismissing an action for failure to state a claim. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). As such, a motion to dismiss for failure to state a claim should be denied unless it "appears beyond doubt that the plaintiff cannot prove any set of facts that would entitle him or her to relief." *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir.

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[3] In *Mangini v. RJ Reynolds Tobacco*, 875 P.2d 73, 78; 7 Cal. 4 th 1057, 1065 (1994) the FTC is quoted by the California Supreme Court to the effect that FTC inaction should not be construed as a determination that a violation has not occurred.

2004); *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1156 (9th Cir. 2000). **As a result, under settled Ninth Circuit precedent, a Rule 12(b)(6) dismissal is only proper in extraordinary cases. *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).**

Further, under Federal Rule of Civil Procedure 8(e), a party may plead claims in the alternative, and therefore, a party may alternatively state claims both for legal and equitable relief. As set forth in Federal Rule of Civil Procedure 8(e)(2):

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. **A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.**

Thus, although a plaintiff may not recover on both theories, "a plaintiff may claim these remedies as alternatives" *E.H. Boly & Son, Inc. V. Schneider*, 525 F.2d 20, 23 (1975); see also *Hubbard Business Plaza v. Lincoln Liberty Life Ins. Co.*, 596 F.Supp. 344, 347 (D. Nev. 1984) ("It is legally proper for a pleading to set forth inconsistent theories as bases for the relief sought.")

Finally, as a practical matter, leave to amend is almost always granted by the Court. Fed. R. Civ. P. § 15(a) expressly states that leave to amend "shall be freely given when justice so requires." As a result, where the complaint might state a claim, leave to amend must be granted. *Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); *Silva v. Bieluch*, 351 F.3d 1045, 1048 (11th Cir. 2003).

B. Plaintiff's Claims Are Legally Sufficient

1. Plaintiff's Claim For Violations of Nevada Consumer Fraud Laws Is Legally Sufficient

The Complaint alleges a scheme by Defendants whereby certain products were fraudulently and unlawfully mislabeled as "Made in the USA," when in fact Defendants knew that the components of the product were imported from and manufactured in China. Plaintiff alleges that such a scheme violates the "Nevada consumer fraud laws, particularly NRS Sections 41.600 and 598.0915." (Complaint at ¶27). These statutes provide victimized consumers, like the Plaintiff, with a private right of action.[4]

Further, there can be no dispute that the conduct alleged in the Complaint violates N.R.S. Section 598.0915 which provides, in relevant part, as follows:

> **A person engages in a 'deceptive trade practice" if, in the course of his business or occupation, he:**
>
> **4. Uses deceptive representations or designations of geographic origin in connection with goods or services for sale or lease.**

N.R.S. § 598.0915.

In this case, the Defendants' false representation and designation of the products as "Made in the USA", when in fact they were not "Made in the USA" within the meaning of state and federal law, plainly violates the express prohibition on such conduct. As held by one Court in California ruling on this same issue:

> **A reasonable consumer of Leatherman's products with the "Made in U.S.A." representation would not expect such foreign manufacturing. (See Fed. Trade Com., Enforcement Policy Statement on United States Origin Claims (Enforcement Policy) 62 Fed. Reg. 63756, 63768 (Dec. 2, 1997)** ["consumers are likely to understand an unqualified U.S. origin claim to mean that the advertised product is 'all or virtually all' made in the United States"].) No reasonable trier of fact could conclude otherwise. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856 [107 Cal. Rptr. 2d 841, 24 P.3d 493].) **Thus, the "Made in U.S.A." representations were deceptive as a matter of law.**

Colgan v. Letherman Tool Group, 135 Cal. App. 4th 663, 682-3 (2006).[5]

Del Monte, however, objects to Plaintiff's reference to federal law regarding the issue of what is "Made in the USA." Such an argument is specious as the Complaint referred to federal law, not to create a right of action, but rather to determine whether a product can be considered "Made in the USA."

The reference to federal law in the Complaint, and in particular, the rules established by the Federal Trade Commission, was to allege the applicable standard for when a product can be called

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[4] Nevada Revised Statute Chapter 598 "generally provides for a public cause of action for deceptive trade practices." *Nev. Power Co. v. Eighth Judicial Dist. Court of Nev.*, 120 Nev. 948, 102 P.3d 578, 583 n.7 (Nev. 2004). Nevada Revised Statute § 41.600 also provides that a victim of "consumer fraud" may assert a private cause of action. *Id.* Consumer fraud includes "[a] deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive." *Id.* (quoting Nev. Rev. Stat. 41.600(2)(d)).

[5] The Court in *Colgan* expressly referred to the FTC standard to determine whether the designation of "Made in USA" was deceptive.

"Made in USA." The product must be "all or virtually all" made in the U.S. Under this standard, "All or virtually all" means that "all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content."

Thus, Plaintiff's citation to the federal standard to determine whether Defendants' conduct is a deceptive trade practice with respect to the designation of a geographic origin was entirely proper. **The citation to federal authority in the Complaint was not intended, nor did it, invoke federal law as a private right of action. Plaintiff's private right of action is based upon N.R.S. Sections 41.600 and 598.0915. Del Monte's argument on this point is misplaced as the federal standard will be the test to determine when the products could lawfully be designated as "Made in the USA" under N.R.S. Section 598.0915.**

2. Plaintiff's Claim for Unjust Enrichment Is Also Legally Sufficient

Del Monte incorrectly asserts that Plaintiff's claim for unjust enrichment fails for two reasons. First, Del Monte argues that Plaintiff cannot allege an equitable claim because "an adequate remedy exists at law." (Motion at p.7). Second, Del Monte contends that the Court should factually find, as a matter of undisputed fact, that "no benefit was retained by the Defendant."

Del Monte's first argument is that Plaintiff cannot allege an equitable claim because Plaintiff has alleged a legal claim. This argument is entitled to short shrift. Settled Nevada and Federal authority permit a party to plead legal and equitable claims in the alternative. *E.H. Boly & Son, Inc. v. Schneider,* 525 F.2d 20, 23 n.3 (9th Cir. 1975); see also *Hubbard Business Plaza*, *supra*, 596 F.Supp. at 347. In *George, supra,* 2007 U.S. Dist. LEXIS 15980, this Court very recently held that a complaint could properly alleged both a legal cause of action for breach of contract and an equitable cause of action for unjust enrichment. *Id.* at * 21.

In Nevada, unjust enrichment is "'the unjust retention of a benefit to the loss of another. . . .'" *Coury v. Robison,* 115 Nev. 84, 976 P.2d 518, 521 (Nev. 1999) (quoting *Nev. Indus. Dev. v. Benedetti,* 103 Nev. 360, 741 P.2d 802, 804 n.2 (Nev. 1987)). A benefit "denotes any form of advantage." Restatement of Restitution § 1 cmt. b (1937); Restatement (Second) of Torts § 886B cmt. c (1979). In this case, the Complaint sufficiently alleges the elements of a claim for unjust enrichment. *Stewart Title of Nevada v. Haenisch*, 2006 U.S. Dist. Lexis 90513, at *19 (D. Nev. 2006). Unjust enrichment applies here because "money paid through misapprehension of facts belongs, in equity and good conscience, to the person who paid it." *Nevada Indus. Dev. v. Benedetti*, 103 Nev. 360, 363, fn.2 (1987).

Under Federal Rule of Civil Procedure 8(e) a party may plead in the alternative and therefore Plaintiff may state a claim both for breach of contract and unjust enrichment. The liberal policy reflected in Rule 8(e)(2) instructs courts not to construe a pleading "as an admission against another alternative or inconsistent pleading in the same case." *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir. 1990) (quoting *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th Cir. 1985)). Thus, although a plaintiff may not recover on both theories, "a plaintiff may claim these remedies as alternatives, leaving the ultimate election for the court." *E.H. Boly & Son, Inc.,supra.* 525 F.2d at 23 n.3; *see also Hubbard Bus. Plaza, supra,* 596 F. Supp. at 347 (stating a "claimant is entitled to introduce his evidence in support of all his claims for relief; if he doesn't make an election among them, the trier of fact decides which, if any, to sustain."). **As a result, there is nothing improper about pleading a legal and an equitable claim in the same Complaint, and Del Monte's argument that the pleading of a legal claim in the Complaint is an admission that defeats the equitable claim is refuted by the express language of Rule 8(e).**

Del Monte's second argument regarding the unjust enrichment claim is that the recall notice issued by Defendants with regard to certain contaminated lots offered a refund of "all voluntarily recalled products." Based on this evidence, Del Monte argues that the Court should factually find that Del Monte did not retain any "benefit." This argument is fatally flawed for multiple reasons. First, the recall notice is not attached to the complaint. Second Del Monte's argument is totally inapposite. The recall of "specific product codes" of products due to contamination is not coextensive with the claim now asserted as to all "Ol' Roy" pet food products sold before March 16, 2007. **The recall notice only offered refunds for certain contaminated lots and is in no way equivalent to the recovery sought in this case for all mislabeled products.** The Class in this case is much broader and substantively different from those affected by the recall notice. Moreover, the claim alleged here is for all mislabeled "Ol' Roy" products sold during the Class period, not just for a specific lot that was contaminated. Plaintiff and the Class Members bought far more pet food that had been fraudulently mislabeled by Defendants than the narrow subset of the lot of contaminated pet food subject to the recall.

Finally this argument also fails as a procedurally flawed dispute as to the merits of Plaintiff's factual allegations (Complaint at ¶46 and ¶ 47), which cannot be resolved through a motion to dismiss. This argument attacks the factual allegations of the complaint which must for purposes of the Motion to Dismiss be viewed as true.

As the Complaint plainly alleges at paragraphs 46 and 47:

> Defendants have benefitted and been enriched by the above-alleged conduct. Defendants sold the Ol' Roy brand pet food products with the false designation that the Ol' Roy brand pet food products were "Made in USA" and thereby unjustly reaped benefits and profits from consumers and the Class as a result of these representations. Defendants received and continues to receive sale benefits and profits at the expense of Plaintiff and the Class using such deceptive representation and designations.

(Complaint at ¶ 46).

> Defendants used there aforementioned representations to induce Plaintiff and the other members of the Class to purchase the Ol' Roy brand pet food products. Accordingly, Defendants received benefits which they have unjustly retained at the expense of Plaintiff and the Class members. Defendants have knowledge of this benefit, voluntarily accepted such benefit, and retained the benefit.

(Complaint at ¶ 47).

3. Plaintiff May Appropriately Seek Out-of-Pocket Damages, Restitution and/or Injunctive Relief

Plaintiff's complaint alleges three counts. Under these three claims, Plaintiff prays for relief in the form of both monetary relief (damages and/or restitution) and injunctive relief. Del Monte does not dispute that both restitution and injunctive relief are available remedies for Plaintiff's equitable claim (unjust enrichment) and the common law fraud claim. As a result, there can be no basis for Del Monte's request that the Court "finds that Plaintiff is not entitled to the remedies of restitutionary disgorgement or injunctive relief." (Def's Proposed Order at p.2). In fact, Del Monte's failure to address the remedies available for the unjust enrichment and fraud claims renders Del Monte's argument on this point without merit.

Del Monte next argues that the prayer for restitution and injunctive relief should be stricken from the complaint because these remedies are not available under the first claim (deceptive trade practices). First, the fact that certain remedies prayed for by Plaintiff may only be available under one claim, but not the other, does not provide a basis to hold that the remedies are altogether unavailable. Contrary to Del Monte's unsupported assertion, unjust enrichment may be alleged in an action which also seeks remedies at law.

More importantly, Del Monte's argument that the monetary relief requested cannot be recovered as damages is plainly wrong. **Nevada law specifically provides that out-of-pocket amounts paid for a deceptively marketed product are the measure of damages for a misrepresentation**. *Goodrich & Pennington Mort. Fund Inc. v. J.R. Woolard*, 120 Nev. 777, 782 (2004). Finally, under the claim for Deceptive Trade Practices, Plaintiff alleged:

> "Plaintiffs were injured by the many violations of the Nevada Consumer Fraud Act, and parallel sister state statutes, and Plaintiffs have thereby been damaged in an amount to be proven at trial. As a direct and proximate result of the acts and practices alleged above, members of the general public who purchased the subject Ol' Roy brand pet food products from Defendants, including the Plaintiff, lost monies in a sum currently unknown but subject to proof at the time of trial.

(Complaint at ¶ 36). As a result, Plaintiff prayed for an award of "damages and/or restitution in an amount to be proven at trial." (Prayer at ¶ 2).

As to the request for injunctive relief, Del Monte points to no authority which could remove this case from the ordinary situation under N.R.S. § 31.010 which governs when an injunction may be granted. The granting of an injunction under Nevada law is not based upon the claim pled, but rather on the requirements of N.R.S. § 31.010. Here, if the conduct of Defendants is held to be deceptive and fraudulent, there can be no dispute that an injunction is well within the discretion of the Court under N.R.S. § 31.010.

Moreover, a prayer for an improper remedy is not grounds for a motion to dismiss under Rule 12. As held in *Massey v. Banning Unified School District*, 256 F.Supp. 2d 1090, 1092 (C.D. Cal. 2003), **a motion to dismiss "will not be granted merely because [a] plaintiff requests a remedy to which he or she is not entitled**." Here, Del Monte's motion to dismiss, challenging the remedy and not the claim, does not comply with Rule 12. "It need not appear that plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted." *Massey, supra*, 256 F.Supp. 2d at 1092, citing *Doe v. United States*, 243 U.S.

App. D.C. 354, 753 F.3d 1092, 1104 (D.C. Cir. 1985).

4. Plaintiff can Legally Plead the Violation of the Consumer Protection Laws of Defendants' Home States as Well as Nevada To Establish the Absence of any True Conflict of Law and the Manageability of the Nationwide Class

After careful analysis of the state consumer protection laws, Plaintiff determined that there is no true conflict of laws between the various states with respect to Defendants' liability for fraudulently mislabeling and selling the products as "Made in the USA." As a result, Nevada law can properly be applied to the claims of the absent class members.

Nevertheless, anticipating Defendants' argument that alleged difference in the laws of the various fifty states could arguably present manageability concerns in a nationwide action, Plaintiff performed a detailed analysis of the laws of the various states to show that there is no conflict of state laws on this issue and therefore no manageability problem. **All states follow federal law on this issue.** Moreover, Plaintiff's complaint specifically alleged how the domicile state law for each defendant was identical to Nevada, and therefore presents no conflict of law issue:

> **The laws of every other state are identical to and/or substantively similar to Nevada consumer fraud laws in that federal law and the laws of every state prohibit the use of deceptive representations regarding the geographic origin of products, and every state similarly authorizes an action by consumers for such conduct.** In addition, the laws of the state of Delaware, and in particular 6 Del. C. § 2532(a)(4) is identical to that of Nevada N.R.S. §598.0915.

(Complaint at ¶ 27).

> **This conduct violates Nevada law, and the law of every other state, including but not limited to California (Cal. Civil Code §1770(a)(4)), Arkansas (Ark. Stat. Ann. §4-88-107(a)(1)), Alabama (Code of Ala. §8-19-5(4)), and Delaware (6 Del. C. §2532), all of which laws are identical in prohibiting deceptive representations or designations of geographic origin in the marketing and sales of goods.**

(Complaint at ¶ 30).

As a result, Plaintiff further alleged:

> To the extent that the Nevada Consumer Fraud Act my be found not to protect the residents of other states, the consumer fraud acts of the Defendants' forum state could be applied to all members of the Class.

(Complaint at ¶ 35).

In the event this Court concludes at some later stage of proceedings that Nevada law does not apply to the claims of out-of- state consumers, the case will remain manageable because the law of the Defendants' forum state can be applied to the claims of all of the absent class members. For example, Plaintiff's alleges that all of the fraudulently labeled products were distributed from Arkansas and purchased by consumers from an Arkansas company (Walmart). As a result, Arkansas law could be found to have a nexus to all of the claims in this case. The same is true with respect to California (Del Monte), Alabama (Sunshine Mills), Nevada (Chemnutra), and Delaware (Wal-Mart, Menu Foods, Sunshine Mills, Del Monte and Chemnutra). All these states follow the federal standard for labeling products as "Made in the U.S.A." and find mislabeling actionable by private citizens as a deceptive trade practice.

Del Monte's reliance on *Philips Petroleum v. Shutts*, 472 U.S. 797 (1985) is misplaced. In *Shutts*, the United States Supreme Court held that a state court may constitutionally exercise jurisdiction over the claims of nonresident plaintiffs and defendants in a nationwide class action case and apply the law of the forum state if 1) the named plaintiff adequately represents the absent class members' interests; 2) the members of the class are given adequate notice and the opportunity to opt out; and 3) the forum state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair." 472 U.S. at 811-822.[6] **Here, Nevada and the states in which Defendants are headquartered all have a significant aggregation of contacts such that application of their law in this action would be "neither arbitrary nor fundamentally unfair" under *Shutts*.**

Moreover, choice of law analysis for a nationwide class action and a determination of its potential impact on the manageability of a class action are premature at the pleadings stage. *Rios v. State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727, 742 (D. Iowa 2007) (**On a motion for judgement on the pleadings "it is premature to determine the manageability of the proposed class action lawsuit given that it is unclear which, and how many, varying state laws will be implicated.**").

[6] After review of the applicable state laws, the trial court, on remand, held that there was no conflict of laws between Kansas, the forum state, and other state laws implicated in the case. On appeal, the Kansas Supreme Court reviewed the laws of each of the eleven states involved in the case to determine the appropriate interest rate at issue. *Shutts v. Phillips Petroleum Corp.*, 240 Kan. 764, 732 P.2d 1286, 1292-1314 (Kan. 1987). Here also, there is no true conflict between the law of the forum state, in this case Nevada, and the other state laws implicated in this case.

In fact many courts have held that choice of law issues are even premature at the class certification stage. *Singer v. AT&T Corp.*, 185 F.R.D. 681, 691 (S. D. Fla. 1998) ("It is well-established that consideration of choice of law issues at the class certification stage is generally premature"); *Kirschner Medical Corp. Sec. Litig.*, 139 F.R.D. 74, 84 (D. Md. 1991); *In re Lilco Sec. Litig.*, 111 F.R.D. 663, 670-71 (E.D.N.Y. 1986); *Gunter v. Ridgewood Energy Corp.*, 164 F.R.D. 391, 399 (D.N.J. 1996).

5. Del Monte's Reliance on the Recall Notice is Improper on a Motion to Strike and Provides no Defense to the Claims in this Action

Del Monte finally argues as a matter of disputed fact that they have retained no benefit from their alleged wrongdoing because they have recalled the product and paid refunds. This argument fails for multiple reasons. First, Defendant's purported recall has nothing to do with the claims of the Class. Defendant's recall notice directed consumers to return certain contaminated lots to receive a refund of the purchase price because certain of the mislabeled lots were contaminated. The package where the product was not only mislabeled but also contaminated and injurious was but one of Plaintiff's many mislabeled products purchased by Plaintiff from Defendants. **The Class in this case as represented by Plaintiff is far broader than the few consumers affected by adulteration of a few lots and the benefit retained is not confined to the adulterated lots.**[7] Here the Class is composed of all consumers who during the Class Period purchased products from Defendants that were falsely and fraudulently mislabeled as "Made in the U.S.A."

Second, references in the argument to extrinsic evidence on a disputed issue of fact is simply never proper on a motion to dismiss under Rule 12. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001). The evidence is not a matter which is subject to judicial notice.[8] Fed. R. Evid. §201. The evidence is undeniable hearsay as to the disputed issue of whether the benefit was retained by Defendants. Fed. R. Evid. § 801 and § 802. The evidence is being used to contest the allegations of the pleading, which are assumed to be correct on a motion to dismiss.

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[7] The issue of any defensive setoff due to a refund which may have been paid to certain consumers is a matter for claims administration, and is not a basis to dismiss claims.

[8] None of the authorities cited by Del Monte support the consideration of this document. In every one of the authorities cited, the document considered by the Court was a **contract or agreement** referenced in the pleadings upon which the claim was based, not a disputed issue of fact concerning the defendant's conduct. Here, the recall is not "central" to Plaintiff's claim, rather, what is central is Defendants' misrepresentation concerning the geographic origin of the products, which fraud was admitted in the recall.

Third, the Complaint, at paragraphs 46 and 47, plainly alleges that Defendants retained the improper benefit. This important factual issue cannot be resolved by reference to a single hearsay piece of evidence during a motion to dismiss. *Simpson*, *supra*, 452 F.3d at 1046.

Fourth, in decisions which have considered the issue, the sufficiency of the refund program was found to be a factual issue which could not be decided in a motion to dismiss. See e.g. *Kagan v. Gibraltar Sav. & Loan Assoc.*, 35 Cal. 3d 582, 591-2; 676 P.2d 1060, 1064 (1984). The evidence was not attached to the complaint and reference to a recall of certain lots wherein the product was admitted to be of Chinese origin does not allow the Court to consider the document as evidence that the Defendant did not retain a benefit from the misrepresentation of geographic origin, which was not part of the recall. *BJC Health System v. Columbia Cas. Co.*, 348 F.3d 685, 687 (8th Cir. 2003).

Finally, Plaintiff strongly disputes the document as evidence that no benefit was retained by the Defendant from the misrepresentation of geographic origin, and as such, the Court may not consider the document as evidence on this disputed factual issue. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Erickson v. Horing*, 2000 U.S. Dist. Lexis 22432, *30 (D. Minn 2000).

V. CONCLUSION

For all of the reasons discussed herein, Plaintiff respectfully submits that Del Monte's motion should be denied.

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